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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 45

UNITED STATES OF AMERICA,
Petitioner,

v.

RICHARD G. AUGENBLICK,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

KENNETH N. JUHL,
Respondent.

On Writs of Certiorari to the United States Court of Claims

REPLY BRIEF FOR RESPONDENT, KENNETH N. JUHL

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REPLY BRIEF FOR RESPONDENT KENNETH N. JUHL

In addition to the statutes quoted by the Government, the Respondent relies on the following statute:

10 U.S.C. 1552(a) provides in pertinent part: The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. . . . Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

ARGUMENT

I

THE COURT MARTIAL EXCEEDED ITS POWER TO ACT AND, THUS RESPONDENT'S CONVICTION WAS A NULLITY

This case involves a court martial that convicted respondent by assuming a power specifically withheld from it. Paragraph 153(a) of the Manual for Courts-Martial is an express injunction to the court martial panel that it "cannot" base a conviction "upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable." This limitation on the power of the court martial to act was ordered by the President and approved by Congress (APP. 386-390, 394).

The mandatory nature of 153(a) was expressly recognized by the staff judge advocate in the formal Advice he prepared pursuant to paragraph 35(b) of the Manual. In that Advice which had to be rendered prior to the trial he stated that the requirements of 153(a) "must" be followed at the trial (APP. 370).

Yet the requirements of 153(a) were not met as found by the Court of Claims. Thus, the legal issue concerns only whether a military court martial can create its own authority and convict where the President, with the approval of Congress, said it could not.

The petitioner basically suggests the following reasons why such a conviction should be sustained without review: (a) Section 76 of the Uniform Code of Military Justice prohibits any review by the Court of Claims; (b) there was no violation of 153(a) since (1) it was waived and (2) there was corroboration; and (c) there was adequate review within the military who possess a greater ability than civilian courts to determine fairness as it applies to the military. Each of these will be discussed separately.

(a) The finality clause of the Uniform Code does not preclude judicial review by the Court of Claims.

In *Gusik v. Schilder*, 340 U.S. 128, the Court rejected the argument that the finality clause changed the scope of review by the courts, holding instead that the recently enacted clause merely restated the scope of review previously in effect.[1] This holding was reaffirmed in *Burns v. Wilson*, 346 U.S. 137, in which the Court again refused to hold that the finality clause precluded judicial review by civilian courts. The Court said it would not reevaluate the evidence amounting to a trial de novo but that it would search the record to assure the accused received the rudimentary fairness required by law.

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[1] The petitioner attempts to distinguish **Shaw v. U. S.**, 357 F.2d 949, and **Shapiro v. U. S.**, 107 Ct. Cl. 650, on the ground that the courts-martial were prior to the enactment of the finality clause, but since the scope of review was merely codified and not changed the attempt must fail. Moreover, in **Shaw** the administrative review was well after the enactment of the finality clause and the Government made the same arguments for finality it now makes.

In the case at bar the Government did violate 153(a) which was designed to give respondent a fair hearing. Petitioner argues that this violation makes no difference for the Court has no jurisdiction to remedy the fundamental injustice. However, it is respectfully submitted that where such injustice and lack of fairness is fundamental and patent as in this case, the law does provide a judicial remedy. *Harmon v. Brucker*, 355 U.S. 579; *Estep v. U. S.*, 327 U.S. 114; *Shaughnessy v. Pedreiro*, 349 U.S. 48.[2]

Petitioner states that 153(a) is not so mandatory as to enable review over the finality clause since other cases involving paragraphs just as mandatory have held review is not permissible. However, the cases, *Humphrey v. Smith*, 336 U.S. 695 and *Whelchel v. McDonald*, 340 U.S. 122, relied on by petitioner are clearly distinguishable. In *Humphrey* there was a violation of pretrial procedures under the Articles of War. The Court held that he was not entitled to review when the trial itself was fair. But the violation in respondent's case went to the very heart of the trial, the power to convict.

Article 32 of the Uniform Code now provides that the type pretrial error involved in *Humphrey* shall not be jurisdictional. There is no such excusing provision in relation to 153(a). Further, in the Order promulgating the Manual there is an express provision that nothing in the Manual will invalidate any trial held before the effective date of the Manual which clearly contemplates that trials after the effective date of the Manual can be invali-

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[2] The Government suggests in its brief that **Harmon v. Brucker** is different because a court martial is involved here, but the Government in that case advanced a very similar argument that the Court could not examine for basic unfairness or illegality because of the finality of the executive decision.

dated by failing to comply with its provisions. Such invalidation is clearly appropriate where a mandatory section as clear and basic as 153(a) is violated.

In *Whelchel* the Manual provided that where reasonable doubt as to sanity existed the accused could not be convicted. The wording is not as exact and basic as the prohibition in 153(a). Moreover, the facts in that case were clear and substantial that no reasonable doubt existed. The accused was examined by a doctor prior to trial who concluded he was sane. The same conclusion was confirmed in the formal pretrial proceedings, and no defense of insanity was entered at the trial. Only after the conviction did the accused present some evidence that he "may" have been under an epileptic seizure at the time of the crime, or "may" have been drunk or insane. All the evidence was considered by the Judge Advocate General who had discretionary authority to grant a new trial and who concluded the accused was sane. Thus, in *Whelchel* there was substantial evidence to support the conviction, which is not present here, and that case involved by its very nature a conclusion as to mental state whereas 153(a) involves only a factual determination. Moreover, *Whelchel* had extended and substantial review which was not available to the respondent.

Petitioner further argues that if any review is permitted such review is limited to habeas corpus actions which are beyond the jurisdiction of the Court of Claims and can be brought only by persons under confinement. Respondent was confined and although the specific relief he can now secure is a monetary judgment the full and actual relief amounts to the abolishment of the confinement and blemish resulting therefrom by the correction of his records which will follow this case as a practical matter. When a man is confined there is a restraint which follows even after

his release and this is even more so where, as here, the respondent remains on active duty in the Air Force. *Carafas v. LaVallee*, 391 U.S. 234; *Peyton v. Rowe*, 391 U.S. 54.

If a man prevails in a habeas corpus action he would receive his back pay as a matter of course, and if, while confined, he should prevail in the Court of Claims, he would receive his release as a matter of course under the doctrine of res judicata. Thus, there are no significant differences between a habeas corpus action and an action for pay based on the same facts in the Court of Claims. Cf. *Estep v. U. S.*, *supra*, 66 S. Ct. 428.

More importantly, it has been long recognized that civilian courts can attack such courts martial which are fundamentally unfair or in excess of the court's power to act where the party is not in confinement. *Shapiro v. U. S.*, 107 Ct. Cl. 650; *Shaw v. U. S.*, 357 F.2d 949; *Gallagher v. Quinn*, 363 F.2d 301 cert. den. 385 U.S. 881; *Jackson v. Wilson*, 147 F. Supp. 296. Of special significance here is footnote 3 in the *Gusik* case, *supra*. in which the Court in citing cases of traditional habeas corpus jurisdiction included cases where the litigant was not in confinement.

The foregoing cases clearly establish that respondent has a classical case of jurisdiction, one where the courts have always acted whether or not the party is in confinement. It is where an executive or court martial arrogates power to itself and acts beyond the power conferred on it. In *Hiatt v. Brown*, 339 U.S. 103, the Court in declining review recognized this classical jurisdiction in stating that the court martial had acted within its lawful powers. See also *Dynes v. Hoover*, 61 U.S. 65, 81; *Runkle v. U. S.*, 122 U.S. 543, 556; *McClaughry v. Deming*, 186 U.S. 49, 63.

The II Argument of petitioner clearly accepts this traditional view and faced with the awareness it supports the respondent Juhl the petitioner places a disclaimer at the end to the effect that although it might sound like it supports Juhl the petitioner will later show why it does not, an assurance that is not fulfilled by petitioner's subsequent brief. The petitioner apparently believes the traditional view supports its position in regard to the respondent Augenblick and, thus, urges the Court to accept it on Augenblick and ignore it on Juhl.

Whether the respondent's position be evaluated on the traditional view of power to act as shown in *Hiatt* or on the expanded view relating to fundamental unfairness as shown in *Burns*, the respondent Juhl was clearly entitled to review by the Court of Claims and such review was not barred by Section 76 of the Uniform Code.

(b) (1) Paragraph 153(a) could not be, and was not, waived.

Jurisdiction cannot be waived. *McClaughry v. Deming*, *supra*, at page 66. But even if it could be it was not here. A waiver must be clear, intended and with full knowledge. *Curtis Publishing Co. v. Butts*, 388 U.S. 130; *Brookhart v. Janis*, 384 U.S. 1; *Johnson v. Zerbst*, 304 U.S. 458; *Bennecke v. Conn. Mut. Life Ins. Co.*, 105 U.S. 355.

The extract from the record relied on by petitioner consists only of a question and answer and does not specify 153(a). It apparently refers to some off the record discussion the parties had and it cannot be determined with any assurance that the defense counsel was referring to 153(a) when he agreed with the law officer's statement that he did not "want instruction on accomplice testimony." He might have thought that the other instructions were sufficient to present 153(a). Indeed, this was

also the view of the staff judge advocate who in reviewing the file said, among other things, that in view of the other instructions and the clear issue presented no specific instruction was required and no prejudice resulted (APP. 358, 383, 384).

In the Advice of the staff judge advocate rendered prior to the trial in which he recommended suit he specifically stated that "the Court must be instructed" on the requirements of 153(a). After the trial the record was reviewed by the same staff judge advocate who as stated in the above paragraph of this brief noted the defect (APP. 370; See also paragraphs 35(b) and 85 of the Manual.)

Thus, the prosecutor and law officer had to be aware that the Court must be instructed on 153(a) and the instruction should have been given without request. Waiver should not be a tactic. For what possible reason would respondent waive the mandatory requirements of 153(a)? Thus, if the law officer was referring to 153(a) he should have named it specifically for obviously respondent was not aware he was being asked to surrender a major defense. To invoke the harsh theory of waiver the facts should be a lot clearer than they are here since the courts endulge every reasonable presumption against waiver. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389; *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292.

(b) (2) Paragraph 153(a) was violated in that the testimony of Hughes, a named accomplice, was self-contradictory and uncorroborated.

Petitioner does not question that Hughes' testimony was self-contradictory[3] which leaves the issue of whether it

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[3] Petitioner states there was no finding that Hughes' testimony was uncertain or improbable. Since the testimony is self-contradictory there is no real need to argue that it is also uncertain or improbable but the very

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was corroborated. To determine this issue the petitioner argues that the Court of Claims had to reweigh the evidence as shown by the extensive findings. However, the evidence did not have to be evaluated or reweighed concerning any controverted fact. The record had to be read but the facts as found by the Court of Claims were apparent on the face of the record. The findings were simply the review authorized by *Burns* and in no way constituted a trial de novo.

The correctness of the findings of the Court of Claims is established by the inability of the petitioner to point to any single concrete fact that corroborates Hughes' testimony. This inability is emphasized when the petitioner resorts to implying that it was corroboration that Juhl was present during "conceded" black market activities on "three occasions."

The petitioner's assumption that on the trip to Southend on June 17 black market activities "concedely" took place is clearly in error and based solely on Hughes' testimony. There is not a shred of evidence outside of Hughes' testimony that any illegal transaction took place on the family outing to Southend. Not even Hughes' wife testified that black marketing occurred on that trip. And Master Sergeant Herron, an independent witness who was never charged with any wrong doing,[4] testified he was with Hughes and Juhl at all times during that trip and no black marketing

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nature of the extensive contradictions here show that his testimony was extremely uncertain and improbable. The Court of Claims clearly considered his testimony totally unreliable and made no finding containing even a hint that it considered his testimony certain or probable to any degree (APP. 374-376, 380-383, 405, 406).

[4] Even Hughes insisted that Herron had nothing to do with black marketing on the trip to Southend (APP. 378).

took place. Obviously, when Hughes decided to implicate Juhl he simply looked back to some time when he had been with him and fashioned the facts accordingly (APP. 377-379).

As to the trip to Squire's home black market activity did occur but outside the presence and knowledge of Juhl. Hughes did everything he could to implicate Juhl. He testified at the Article 32 hearing that the cigars were in the back seat in Juhl's view. But he did not repeat this testimony at the trial when Squire testified that the cigars were in the trunk outside of the sight of Juhl. Hughes testified at the Article 32 hearing that Juhl stayed in and by the side of the car acting as a lookout but at the trial he moved Juhl out in the road to act as a lookout. Squire testified that Juhl was not involved and was in the front yard from where he could see neither the car nor act as lookout during the unloading (APP. 375, 376, 408, 409). Squire contradicted Hughes on every material fact Hughes had designed to implicate Juhl. Corroboration cannot arise from such direct contradiction.[5]

The respondent is unable to identify the third occasion referred to by petitioner[6] but assuming it to be based on Shields' testimony concerning an alleged trip to the Post Exchange, which is certainly not conceded, the record clearly shows Juhl had no knowledge of any black market activity even if any did take place (APP. 410, 411). Shields was a named accomplice and his testimony, unspecific as

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[5] Squire's wife, by an affidavit later submitted, fully affirmed Juhl's testimony and directly contradicted Hughes. It is difficult to conceive any reason why Squire would have lied and, conversely, there are many reasons why Hughes would. Squire never gave an inconsistent statement on this matter (APP. 375, 376, 359; Jt. Ex. 2, pp. 35).

[6] Petitioner cannot be referring to the alleged trip of June 9 since this charge rested solely on Hughes' testimony and there is nothing in the record to suggest that it is "conceded" that such a trip took place. Also this charge was not contained in the formal specifications (APP. 376, 406, 407.)

to date, was self-contradictory and uncorroborated. Even the court martial considered Shields' testimony totally unreliable since it acquitted respondent on the two charges on which Shields was the named accomplice (APP. 374, 409, 410, 414, 417).

Thus, petitioner cannot point to a single fact in the trial which corroborates the self-contradictory testimony of Hughes.[7] As far as the record shows, ignoring the tainted testimony of the accomplice, the only black market activity was that on the trip to Squire's house which occurred completely outside of Juhl's presence and knowledge.

Recognizing this inability to show any independent factual testimony to corroborate the accomplice[8] the petitioner turns to the flagrantly defective testimony of Hughes' wife. Her testimony did not show black market activity and did not corroborate Hughes. But even more damaging is the fact that she was coached by her husband. The petitioner can have no doubt that she was coached as a reading of the transcript shows (APP. 379, 380, 407, 408, 364-369). Coupled with this is that she was only put on in rebuttal. The prosecutor must have interviewed her prior to trial. Why did he decline to put her on earlier?

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[7] Nor can petitioner gain comfort from the testimony of the salesgirls who expressly vindicated respondent and whose prior statements were not introduced even for the limited purpose of showing inconsistency (APP. 374, 375, 411, 412).

[8] Petitioner also argues that 153(a) sets a higher standard than required in civilian courts. But on all the facts of this case either standard, whether civilian or military, would show respondent was deprived of a fair trial. However, assuming 153(a) in some cases requires nullification of a conviction that would stand if the trial had been in a civilian court, there are obviously good reasons for such a higher standard. The military is able to put more prolonged pressures on an accomplice than would a civilian prosecutor. In this case not only did they threaten Hughes with further charges and five years imprisonment, but also with a dishonorable discharge which

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(c) No appellate review was afforded respondent.

Petitioner argues that courts-martial should not be reviewable outside of the military since there are adequate procedures for direct review within the military and cites cases where the trials were fully reviewed by the Court of Military Appeals, by the Judge Advocate General and by the Secretary. No such direct review was available to respondent (APP. 384).

The petitioner erroneously states that there was "appellate review." A sentence must be approved by the convening authority before it can be executed. (Paragraph 86 of the Manual for Courts-Martial). Before approving a general court-martial the convening authority must refer the record to his staff judge advocate for review. (Paragraph 85 of the Manual for Courts-Martial). In this case the record was referred to the same staff judge advocate, Lt. Col. Wier, who had rendered the pretrial Advice recommending the trial of Juhl and advising on the wording of the charges (APP. 370, 371, 350, 358). This is the "appellate review" referred to by petitioner. It was obviously no more than a review by the prosecutor.

Not a case cited by petitioner involves so little direct review as in this case. And the very force of petitioner's arguments interlaced with numerous references to the extensive appellate procedures detailed in the Uniform Code and Manual to protect against error and insure fairness is wasted away when considered in the light of the facts of this case showing no direct appellate review whatsoever.

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would have prevented his wife, an alien, from returning to this country with him (APP. 362, 363). When such facts are considered along with the natural discipline expected throughout the military it is easily seen why Professor Morgan, the President and Congress believed strict safeguards against unreliable accomplice testimony were required to insure fundamental fairness.

When no appeal is possible a convening authority is much more inclined to assume power not granted it and convict, as in this case, where it has no authority to convict. *Thompson v. City of Louisville*, 362 U.S. 199. This is the very basis of the *Shaw* case, *supra*, in which the Court of Claims emphasized the absence of appeal rights to the Court of Military Appeals. But even in *Shaw* there was much more direct review than here since it was reviewed by the Navy Judge Advocate General on two occasions. Here respondent had no protection against totally arbitrary action by the court-martial and convening authority.

II

THE COURT OF CLAIMS HAS JURISDICTION TO REVIEW ANY ADMINISTRATIVE DECISION UNDER THE STATUTE FOR THE CORRECTION OF MILITARY RECORDS.

After respondent served his sentence he applied to the Air Force Board for the Correction of Military Records for collateral review of his court-martial. In support of his application he submitted eighteen affidavits, many from persons who had no interest other than telling the truth, which clearly established the injustice and errors in respondent's conviction. The Board denied the application without securing any evidence to rebut the affidavits and record upon the ground that insufficient evidence had been presented to show "probable error."[9] (Jt. Ex. 2; APP. 417-420, 386).

[9] Petitioner argues that the Court of Claims rejected Ashe v. McNamara, 355 F.2d 277, and ruled it could not review this case under the correction statute. But such an interpretation is clearly in error. The Court merely ruled that the Correction Board proceedings added nothing to the case since it already had jurisdiction to review. Obviously the Court would have found the same errors if it had been restricted to the Correction Board proceedings.

The petitioner admits that the finality clause of the Uniform Code does not prevent collateral review of a court-martial under the statute for the correction of military records, 10 U.S.C. 1552, and so the Attorney General has specifically ruled. 40 Ops. Atty. Gen. 504, 506-7; 41 Ops. Atty. Gen. 49. The petitioner further admits that action under the correction statute can be reviewed by a court where it involves retired pay. *Beckham v. U. S.*, 375 F.2d 782. But petitioner then states that clearly no such review is available when a court-martial is involved without citing any authority for such a distinction. (See petitioner's brief, p. 47, footnote 31).

Under the correction statute the Secretary is given express authority to change any military record "to correct an error" or "remove an injustice." But whereas courts-martial under Article 76 of the Uniform Code were made final and binding on "all departments, courts, agencies, and officers of the United States," 10 U.S.C. 876, decisions under the correction statute were only made final and conclusive on "all officers of the United States." 10 U.S.C. 1552. Congress specifically considered and rejected making any decision under the correction statute final and binding on the courts. (See discussion of legislative history in *Ashe v. McNamara*, 355 F.2d at 281).

Basically, petitioner's position is that the Secretary can collaterally attack a court-martial but a court cannot. But there is nothing in the statute or legislative history to support such an argument. None of the decisions under the correction statute was excluded from court review, and so the courts have held. *Harmon v. Brucher*, *supra*; *Ashe v. McNamara*, *supra*; *Smith v. McNamara*; ...F. 2d ..., C.A. 10, No. 9761, June 12, 1968.[10]

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[10] Nor is Davies v. Clifford, 393 F.2d 496, contrary to Ashe. In Davies the plaintiff had received full administrative correction and was not complaining of the action taken under the correction statute.

III

THE RESPONDENT'S TRIAL LACKED THE FUNDAMENTAL FAIRNESS REQUIRED BY THE CONSTITUTION

The following facts are apparent on the face of the record.

(1) Extreme pressures were brought on Hughes, an admitted perjurer and crook, to induce him to testify against respondent. He was threatened with further legal action and a dishonorable discharge, which would have prevented his wife, an alien, from coming to this country with him. (Note that a technical sergeant in the Air Police, who had custody of Hughes up to his trial, stated under oath from his personal knowledge that Hughes was so threatened (APP. 362, 363).)

(2) After Hughes agreed to testify against respondent and before the trial he was given highly unusual and favored treatment, such as office work, passes, and permission to watch television and attend movies with his wife, to induce him to stay in the right frame of mind to testify. After he testified he continued to receive favored treatment and had his sentence reduced to 104 days which was considerably less than the five months he would have had to serve with credit for good conduct (APP. 405, 406, 377, 378).

(3) One of the witnesses, Master Sergeant Herron, was met by Government police immediately before the trial and treated in such a manner that could only have been intended to intimidate him. They told him of his rights under Article 31 of the Uniform Code and gave him every indication they were investigating him, even informing him he could get into trouble unless he changed his statement (APP. 360, 361, 378).

Such facts when considered with the numerous contradictions in Hughes' testimony show respondent was denied the fair hearing required by the Constitution. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717; *Turner v. State of Louisiana*, 379 U.S. 466.

The record shows that Hughes needed very little inducement to lie. Could any one have any doubt he would lie to escape the extreme threat made to him by the Government? Could respondent expect to have a fair trial, with untampered witnesses, when such threats were made to a man of Hughes' character? The very purpose of paragraph 153(a) of the Manual was to prevent the very situation that arose here since it is well known that criminals are peculiarly susceptible to pressures to indict others, and that such testimony is distinctly unreliable.

CONCLUSION

For the foregoing reasons the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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October 11, 1968.

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing reply brief in a duly addressed envelope with air mail postage prepaid to the Honorable Erwin N. Griswald, Solicitor General, U. S. Department of Justice, Washington, D. C. 20530, this ..... day of October, 1968.

.....

FRANCIS J. STEINER, JR.